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Implementation of the Trans-Pacific Partnership Intellectual Property Chapter

Google New Zealand appreciates the opportunity to comment on the Government's discussion paper on the implementation of the Trans-Pacific Partnership Agreement (TPP) Intellectual Property Chapter.

Overview of submission

In this submission Google addresses four main issues:

1. The need for holistic reform of the *Copyright Act* 1994 (the Act) to ensure New Zealand law is best placed to meet the challenges and opportunities of the digital age
2. The importance of ensuring any interim copyright amendments made in relation to the TPP do not limit New Zealand's capacity to implement broader law reform objectives
3. The need for flexibility in the Act becomes more critical following the term extension required by the TPP
4. The desirability of amendments to the safe harbour provisions in the Act to ensure that New Zealand is in compliance with Article 18.82 of the TPP, while still ensuring legal protection for the basic technical functions required to provide internet services.

Introduction

As the discussion paper makes clear, New Zealand will need to amend the *Copyright Act* 1994 (the Act) in order to comply with its obligations under the TPP. These amendments would be made against the background of the previous Government decision in 2013 to postpone a detailed review of the Act pending the TPP negotiations.

The conclusion of the TPP negotiations and the recognition of the need to amend the Act as a result provides a timely opportunity for the Government to return to a broader copyright reform agenda. Given the technological developments since the 2008 amendments, Google would encourage the Government to adopt a coherent approach to copyright policy development by taking a holistic rather than piecemeal approach to implementing the changes that are required by the TPP.

If, however, the Government is not minded to hold off on TPP amendments until a broader copyright and/or media reform process has been completed, it will be imperative to ensure that

there is nothing in any amendments made as a result of the TPP that have any potential to constrain the Government's ability to enact flexible and future-proofed copyright laws to support new forms of innovation as well as investment in, and adoption of, digital technologies.

1 The importance of holistic copyright reform

It is encouraging to see that the Government's TPP Fact Sheet notes that a broad and flexible exceptions provision applies to all the copyright provisions in the TPP, and that the effect of this will be that TPP parties retain their current ability to adopt and maintain copyright exceptions under international law in order to ensure that copyright laws remain relevant in light of changing technologies.[1] This, in our view, is crucial.

Getting the copyright balance right is critical for innovation and investment

Virtually every online or digital activity - from browsing on the internet to the use of cloud storage services - involves the making of copies. This puts copyright law at the front and centre of innovation policy. It also means that getting copyright policy right is critical to enable all innovators - startups, creators, researchers, academics, local and international businesses - to invest in new creations or innovative technologies without unreasonable risk of legal challenge.

The nature of innovation is that it is dynamic, not static. It is simply not possible to predict in advance the range of new transformative uses of technology that may be possible in the future. That is why any analysis of whether copyright exceptions are adequate and appropriate for the digital environment must not be confined to a consideration as to whether copyright exceptions are appropriate for the digital environment as it exists *today*. It is imperative to future proof copyright law to ensure that New Zealand is well placed to take advantage of not only the next wave of innovation, but also the one after that. Flexible copyright exceptions provide a framework for considering new and innovative uses, as and when they emerge, without the need to go back to the legislative drawing board.

The existing copyright exceptions are no longer fit for purpose in a digital environment

As the Government has itself acknowledged, rapid technological change has rendered the existing copyright exceptions increasingly out of date.[2] That was the case in 2013 - when the review of the Act was proposed to be undertaken - and it is even more the case today. The current list of static purpose-based exceptions are no longer fit for purpose in a digital environment. Technologies that use copyright in ways that do not fall within the technical confines of an existing exception are automatically ruled out in New Zealand, no matter how strong the public interest in enabling that new use may be.

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[1] TPP Intellectual Property Fact Sheet

[2] Cabinet Paper - Delayed Review of the Copyright Act 1994

New Zealand's current set of static exceptions means that a new technology is given an 'automatic no' to the question of whether it would be lawful in New Zealand, unless it falls within one of the existing technology-specific exceptions. In contrast, a flexible exception would allow innovation to occur, as long as it is fair and does not unduly harm copyright owners.

Increasingly, this is putting New Zealand at a comparative disadvantage to jurisdictions - such as the US, Singapore, Israel, South Korea and Canada - that have flexible copyright exceptions. A 2015 report[3] published by Brussels think tank the Lisbon Council measured the impact of copyright exceptions on economic growth, jobs and prosperity. It found a positive correlation between flexible copyright exceptions and better economic outcomes, not only in the IT sector, but also across the economy generally. Recent econometric research has also shown that countries that have adopted flexible exceptions see benefits not just for firms that rely on copyright exceptions, but also for firms that rely on copyright protection.[4]

In 2006 Singapore implemented flexible copyright exceptions into its Copyright Act. Prior to that, private copying technology industries experienced about 2% annual growth. After the changes were introduced the same industries enjoyed a 10% average annual growth rate (Ghafele & Gibert, 2012).

The changes required by the TPP make broader copyright reform even more urgent

Some of the changes to New Zealand law required by the TPP risk a negative impact on creation and on innovation. The Government has itself acknowledged that while the net cost of extending New Zealand's copyright term from 50 to 70 years will be small to begin with, it will increase to an annual average cost of around $55 million[5]. Term extension will also mean that New Zealand consumers and businesses will forego savings they otherwise would have made from books, music and films coming out of copyright earlier.[6] This has an impact on creators in relation to their capacity to creatively build and repurpose works as they enter the public domain.

The TPP changes will strengthen copyright owner protections in two ways: they will extend the life of protection for copyright works by 20 years, and they will provide stronger protection to technological protection measures (TPMs). While US copyright owners also enjoy these protections, there are two crucial aspects of US copyright law - which are currently absent from New Zealand copyright law - that ensure an appropriate balance between copyright owners and users.

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[3] The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity, Benjamin Gibert, Lisbon Council

[4] Firm Performance in Countries With & Without Open Copyright Exceptions, Mike Palmedo, 2015 - http://infojustice.org/archives/34386)

[5] Ibid

[6] Ibid

Fair use

The first of these is the broad and flexible fair use exception that operates as a safety valve for what would otherwise be overbroad copyright protection. Importing those aspects of US copyright law that carry a risk of a negative impact without the safety valve of flexible copyright exceptions - which are an essential part of the copyright balance in the US - results in an unbalanced regime. Flexible exceptions enable copyright protected works to continue to be used for socially useful purposes that do not unreasonably interfere with the legitimate interests of copyright owners.

This issue was expressly raised as a concern in Australia at the time it implemented similar term extension and TPM obligations as a result of the Australia - United States Free Trade Agreement (AUSFTA). The Joint Standing Committee on Treaties examining AUSFTA stated:

> *The ... Australian negotiators defended the term of copyright protection vehemently, but that the final outcome was necessary to secure the overall package. In order to ensure that the balance of interests between users and owners is maintained (as the evidence suggests it will be altered under the AUSFTA) the Committee [recommends that] ... the changes being made [to the Copyright Act] replace the Australian doctrine of fair dealing for a doctrine that resembles the United States open-ended defence of fair use, to counter the effects of the extension of copyright protection ..."* [7]

Similarly, the Senate Select Committee considering AUSFTA stated:

> *The Committee is of the view that [fair use style] exceptions should have been considered as part of the initial AUSFTA implementation legislation package. The increased copyright protection term is a major amendment to the* Copyright Act 1968 *and, without amendments that correspondingly protect the interests of copyright users, the Committee believes that the changes tilt the balance towards copyright owners to an unacceptable degree."*[8]

The introduction of a flexible exception such as fair use would provide an important counterbalance to the extension of term required by the TPP. However, this is not the most important reason why flexible exceptions are desirable. Creativity is inherently flexible and dynamic - copyright laws which have a goal of encouraging creativity and innovation must themselves be flexible and dynamic.

'Originality'

[7] Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, *Report 61: The Australia - United States Free Trade Agreement*, June 2004, Canberra pp 237-238

[8] Parliament of the Commonwealth of Australia, Senate Select Committee on the Free Trade Agreement between Australia and the United States*, Final Report*, August 2004, Canberra, p77

The second significant limiting factor on the scope of US copyright law is the test of 'originality'; ie the threshold for determining when a work is capable of attracting copyright protection in the first place. New Zealand courts apply a very low threshold - as compared with the US - when determining whether a work is capable of attracting copyright protection.[9] This means that New Zealand extends copyright protection to a much broader category of works, including factual compilations without a 'spark of creativity', than does the US, with the result that the proposed term extension will have a more significant impact in New Zealand than it did in the US.

This underscores the importance of taking a broader view of copyright reform that will ensure that the changes that are required by the TPP do not have unintended effects on copyright balance. Ideally, that would mean postponing any TPP-related legislative changes until the broader review of copyright can be undertaken. If that is not possible, however, the Government's stated aim for conducting a broader review of the Act - ie ensuring that the Act is fit for purposes in a digital environment - should be kept firmly in mind when implementing the changes required by the TPP.

Getting to yes - how to introduce flexibility, and future-proof copyright law

At present, New Zealand creators and entrepreneurs often are not permitted to innovate or build creative new works or technologies, no matter how 'fair' that new creation or innovation may be, when assessed against the interests of rights holders and the public interest in encouraging new creation.

In other words, New Zealand creators often receive an "automatic no" to the question of whether they can build on the works of others, rather than being permitted to create new works or technologies, as long as that creation is fair. Given the research above, it is likely that New Zealand would benefit from a situation where new technology or use of copyright works can be permitted, if it is considered to be in the public interest (after balancing the interests of copyright owners and other relevant factors).

The best way to achieve this is to enact a flexible exception, or set of exceptions, to enable new uses of copyright materials to be assessed against a set of set factors to determine whether a new use is 'fair'. This would enable the creation of new works (including mash-ups and remixes), and the development of new technologies - when fair - without the need for further law making. It would also allow copyright owners to challenge these new creations if they believed that they were not fair, or unduly harmed copyright markets. The courts would then be

[9] See, for example, *University of Waikato v Benchmarking Services Ltd* [2004] NZCA 90, in which the New Zealand Court of Appeal confirmed that threshold test is not high, and that the determining factor is whether sufficient **time, skill, labour or judgmen**t has been expended in producing the work. This is known as the "sweat of the brow" test. Compare this with the US test as articulated by the US Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.* 499 U.S. 340 (1991). The US court rejected the "sweat of the brow" test, and said that it was necessary to point to some "**at least some minimal degree of creativity**" was necessary before a work would be protected by copyright.

able to determine the appropriateness of the technologies by applying a clearly articulated set of factors.
Reform options would include:

- replacing some or all of the existing purpose based exceptions with an open-ended flexible exception, or
- keeping the existing exceptions (after review to ensure technological neutral operation) and introducing a supplementary flexible exception.

The New Zealand Government could also consider adding specific new exceptions where justified, such as the Canadian user-generated content exception[10].

The Australian Law Reform Commission recently recommended that Australia update its copyright laws to introduce a flexible exception, noting that flexible exceptions are something that "technologically ambitious small countries might adopt"[11]. A similar exception would be well suited in the New Zealand context.

Some critics of flexible exceptions have suggested that a regime of this kind is inherently uncertain. But flexibility is not the same as unpredictability. Overseas experience shows it is possible to develop guidelines that provide both rights holders and technological innovators a great degree of day to day certainty. And complete certainty that a new creative use is ***not*** permitted can never be better than some degree of uncertainty about whether the creation can occur. An environment that is pro-innovation would benefit copyright owners, consumers and innovators alike.

Safe harbours

Article 18.82 of the TPP requires parties to enact safe harbours that include:

- legal incentives for Internet Service Providers to cooperate with copyright owners to deter the unauthorised storage and transmission of copyrighted materials or, in the alternative, to take other action to deter the unauthorised storage and transmission of copyrighted materials; and
- limitations in [their] law that have the effect of precluding monetary relief against Internet Service Providers for copyright infringements that they do not control, initiate or direct, and that take place through systems or networks controlled or operated by them or on their behalf.

These safe harbours are required to be provided in respect of the following functions:

[10] See section 29.21 Canada Copyright Act (R.S.C., 1985, c. C-42)
[11] Australian Law Reform Commission *Copyright and the Digital Economy* Summary Report p15.

a. transmitting, routing or providing connections for material without modification of its content or the intermediate and transient storage of that material done automatically in the course of such a technical process
b. caching carried out through an automated process
c. storage, at the direction of a user, of material residing on a system or network controlled or operated by or for the Internet Service Provider
d. referring or linking users to an online location by using information location tools, including hyperlinks and directories.

It is not clear that New Zealand would be in a position to comply with this obligation with respect to the activities in (a) and (d) above.

With respect to the "mere conduit" activities covered by paragraph (a), s 92B of the Act currently provides that an ISP does not infringe the copyright in a work "merely because" the ISP's user used those services to infringe the copyright in the work, but this provision does not limit a rights holder's ability to seek injunctive relief.

With respect to the activities in (d), we understand that the New Zealand Government has adopted the view that no safe harbour provision is required to protect ISPs providing referral or linking services from liability, on the basis that the provision of such services will not constitute copyright infringement.

Summary

The conclusion of the TPP process represents an excellent opportunity for New Zealand to undertake a holistic analysis of its copyright system to ensure it is appropriately adapted for the digital age. Google would be pleased to contribute to any deliberations in this regard.